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THE ULTIMATE SOURCES OF THE DEVELOPMENT OF THE LAW.

By WM. DRAPER LEWIS, Ph.D.

In the paper on "Law and Sovereignty," I tried to point out that custom was the root of all law, and that the enforcement of a custom, or definite rule of action on an individual member of a community depended on the fact that back of the officer who enforced the law was the active desire, or acquiescence, on the part of the brute force of the community that it should be enforced. Law, therefore, can be said to have its ultimate reason for being in the desire of the community that it should be. Jurisprudence, however, is not static, but dynamic. At any one time the law is fixed, but as the ideas and desires of men which lie at the foundation of the law never remain from one generation to another exactly the same, so law, which is but the outward expression of these ideas and desires, also modifies and changes. The ultimate sources of the law's development which I wish to touch on in this paper are the causes which affect the ideas and desires of man.

Now, the springs of human ideas and consequent desires and actions are co-extensive with the universe. Nothing that exists for man, no principle of his own nature or fact of the external world, is without its influence on him, and through him on that which he desires and does. The ultimate sources of law, or the rules of conduct followed by men, are to be found in the combination of their mental characteristics and tastes with the physical facts of nature by which they are surrounded.

I desire to take up three examples: one to show the effect of differences in physical environment on law, another to show the effect of differences in character, and a third to illustrate the effect of changes in taste, or capacity for pleasure and pain.

Physical differences, that is, differences of soil, climate, etc., are the most fruitful sources of differences in the legal conceptions of primitive peoples. Differences in the climate of the different states of the United States have practically but little effect on their laws. But among primitive peoples there is little or no commerce. They live off of the products of the soil in their immediate vicinity. The conditions of production and the conditions of climate and soil in their neighborhood make the total of their physical environment. With us all parts of the earth minister to our pleasure, and our physical environment is co-extensive with the climate and soil of the world itself. All civilized peoples—the peoples of Western Europe and America—have practically the same physical conditions, or rather, they have practically the same conditions as compared with the widely different conditions which confront primitive peoples in different parts of the globe. This difference in physical environment of the ancestors of modern European nations, and those other branches of the Aryan stock which moved into India, is the reason, I believe, not only for some of the fundamental differences in the civilization of the two nations, but for the radical difference in some of their most elementary legal conceptions.

To take an example. The basic idea of our law to-day is, our conception of private property,—the absolute control of the individual man or woman over the land or goods which are his or her own. This conception of the right of private property depends on our idea of the individual as a separate unit apart from the other members of the community, or of his own immediate family.

If this emphasis of the individual, as we may call it, did not exist, individual property, in its modern legal sense, could not exist. The characteristic feature of those people who are in an earlier stage of social development is communism. It is not the modern communism where each shall stand equal politically, socially and economically, but a communism which resulted from the fact that the individual life, as we know it, did not exist. Society was not resolved into individual units. The community and the family were the units on which obli-

gations rested, and by which rights were possessed. As a consequence, land was held in common by the whole community, while cattle were the property, not of the individual, but rather of the family. The difference between India and Europe to-day is simply that the West has moved more rapidly away from this primitive communism and towards individualism. The difference in the rate of development is marked in the differences which surround the law of property. Thus, in India, as a rule,¹ at the time of the English occupation, while personal property in the local village communities was held by individuals or by families, and land was held in severalty, that is, by distinct individuals or families, property could not be conveyed except with the consent of what we might call the village council. The main cause of this relative backwardness in legal development was, I believe, entirely climatic or physical. Owing to the climate, land in India was easily cultivated. Land, as such, was therefore the chief item of wealth. The mere possession of land meant riches.

On the other hand, the climate of Europe made the land, especially to a primitive people, hard to cultivate. Land was not of itself so much to be desired as the means to cultivate it. Cattle for the purpose of tilling the soil was, therefore, the chief item of wealth. This difference between the chief items of wealth had a two-fold effect. In the first place, ideas of individual ownership could grow up more readily around the cattle, which were reared by the individual man, than around land which no man made and which no labor could increase. The difference, however, would, perhaps, never have created individual property had it not been for another characteristic of cattle as property. The cattle of one community could be driven off by members of the neighboring community. Wherever among Teutonic peoples we find survivals of an earlier mode of life, cattle stealing seems to be the most prominent crime. The borderland between Scotland and

¹ It must be borne in mind not only that India is an expression covering a multitude of peoples with distinct customs, but the Anglicizing of Indian legal ideas is in active progress.

England, and parts of the Scotch Highlands, down almost to the last century, are good examples of this; while there must have been generations of petty raids by one small community on another before the "nation devoted to arms," which Cæsar and Tacitus observed, could have been developed.

In India, on the other hand, nothing could be gained by conquest except the exaction of a tribute of a portion of the products of the soil from the conquered people. This kind of conquest involves a degree of organization on the part of the conqueror, which is only observed among early races when the necessity of a prolonged migration presents itself. After the migration of a branch of Aryan stock to India, therefore, they seemed to have settled down in villages and become essentially a peace-loving people. As such, they were exposed to the more warlike tribes of the North. Before the English occupation, India seems to have been subject to a series of invasions—Mohammedans, Emperors of Deli, the Mahratter Brigands and the Sheks, one after another fostered their dynasties on the country. The conquerors, however, left the life of the village community undisturbed, simply exacting a quota of the produce for the support of their armies. The total result, whether I have rightly described its cause or not, was the war-loving characteristics of the West, and the essential love of peace in the East.

Now, however, disastrous to their present happiness was the constant fighting of the Teutonic peoples—it certainly developed the individual as such. It was the individual who lead in battle, not the family. War required personal leaders, and the leader, for himself, seems from the first to have demanded a large share of the spoil. The most casual observation of German tribal life shows the individualism that is cropping out among the essentially communistic character of the community as a whole, and these individualistic features are all connected with war. The land is divided equally for the purposes of cultivation among the families; but the individual boy is invested with a shield and spear before the assembled host, and thereafter takes his place as a man among his fellow men. This impetus to individual life and action,

and the struggle for existence, and the personal ambition which came with it, is, I believe, the keynote to that greater progress of the West which has as one of its results our peculiar ideas of individual property.

Having thus seen how physical differences may affect the development of law, let us take an illustration of the effect of differences of character.

It has always been a source of interesting speculation why some nations excel others in particular lines of mental development. Why, for instance, among all ancient peoples did the Roman have the legal faculty? His art he borrowed from Greece, his later administration from Persia and the East, but his law was the native product of his own genius. It enabled him not only to conquer, as the Greek Alexander, but to civilize. Perhaps no great achievement of any peoples—as the art and poetry of Greece, the self dependence of the Saxon has only one cause. But if one thing more than another made the Roman the law-giver of the world it was his sense of honesty combined with his conservatism. Many an incident in the history of early Rome may make us wonder at such a statement. But remember that it is only by comparison that we must judge a people. Ethical ideas are always of slow growth, but the one which finally took possession of the Roman with greater tenacity than any other was the sacredness of the spoken word. We see the same trait in the other great law-giving nation—the Anglo-Saxon. It is true of no other people. Homer is evidence of the ethical importance of truth and honesty to the primitive Greek. The duplicity of Ulysis is held up to even greater admiration than the bravery of Achilles. To peoples who inhabit what we vaguely call the East, lying seems to be a moral necessity. One of the most hopeless tasks of the missionary in India is to inculcate Western ideas of truth.

Now, to the development of law, the conception of the obligation of an agreement between man and man is essential. Until this obligation is firmly rooted in the mind, law necessarily remains in the infancy of its development. And yet, the force which creates the obligation of the contract is the

sacredness of the spoken word. Where this is not held sacred, the obligation to perform an agreement must rest, where it exists at all, in the form in which the agreement was made, and the law must be full of technicalities and absurdities. The law of contracts, or the conceptions which gather round the contract between man and man, and how far the state will enforce the same, or the sanction for its non-performance, all this has had its origin in those characteristics of the English and the Roman mind, which caused them to place truthfulness as perhaps the central virtue of their code of ethical ideas, and, therefore, in time, necessarily to look behind the form of the agreement to the intent of the parties. It was the effort to work out the true intent of agreements that ultimately made the Roman law almost the perfection of reason. To-day the vast majority of the relations of men in society is a contractual relation, or one based on contract—on the sacredness of the spoken word. It was the lack of this desire for truth which prevented more than anything else, the legal development of other ancient civilizations placed in the same physical conditions as the Romans.

But after all, that which as much as anything else lies back of civilization's development and the development of legal ideas, is man's capacity for pleasure. This may seem a somewhat novel proposition. Few of us, I believe, realize the effect of the character of a nation's desires on its development. But a single question will bring into prominence the real importance of the desire in shaping the trend of our civilization. The world at present is full of socialistic ideas and theories. But if the pleasures of man are mainly derived from the personal service of his fellow man, socialism as at present conceived is out of the question. It is a plan of civilization which omits the satisfaction of pleasure now ministered to by servants. Yet man will have what he wants, and his customs and his ideas will conform themselves to those wants, and any theory of the organization of society must satisfy the desires of man as they are. The more civilized man becomes, the greater his power over nature, and the greater his range of choice, the more important to his development becomes the character of the things

he chooses. In order to show that this is not a mere speculation, I will point to a specific instance of the effect of certain desires on custom and law. We all know that Roman society, in the later Republic, and well down into the Empire, was built largely on slavery. Why was this? The answer, I think, lies in the fact that the capacity of the Roman for pleasure was largely administered to by personal services. The bath and its attendants, the consumption of his meals, the sights in the arena, made up a large portion of his pleasures. This required the implicit obedience of unskilled laborers. To show that this gave the impetus to slavery, and all the legal conceptions which gather around it, we have but to point out that, as the Roman grew to love beautiful things which could not be produced by unskilled laborers, there grew up in Rome a class of free laborers, painters, architects, etc., and a class of intelligent slaves. All through the decadence of the Empire, the position of the slave is becoming better and better. At first the master is restrained from beating his slave severely, killing him is practically made murder; then a slave, under certain conditions, can own property and is thus enabled to purchase his own freedom; and finally slavery, as the early Empire knew it, practically vanished from Roman civilization, — a change which is, of course, hastened by the ethical ideas cultivated by Christianity, but which was almost necessary as the result of developing tastes. If the slaves in the body politic must, from the nature of their work, possess individual skill, the end of their personal slavery is only a question of time. It is not from the tiller of the soil of mediæval Europe, but from the unskilled maker of armor and his apprentices, that our ideas concerning the legal rights of employer and employed have arisen¹. As a result of developing tastes and the progress of invention and changes in production, the old status of master and slave gave way to the modern theory of a contractual relation. So great indeed is the reaction from the old condition that the principal class of contracts which courts will not specifically enforce is the contract of personal service.

In this connection, one may be permitted to make an

¹ I speak of industry rather than domestic service.

attempt at prophecy. We should say that the continuance of the idea that government is the preserver of the peace of the community, and not a producer, which is a prominent characteristic of our present civilization, depends largely on whether the pleasures of man can, in the future, be satisfied by individual effort, or whether the character of our tastes will involve, to a much greater degree than at present, the necessity for the united action of the whole community in order that they may be gratified. However, this is apart from our present object, which is simply to illustrate the fact that ideas and customs, and consequently rules of human action or law, are not *à priori* and fixed conditions, but the result of growth; and that, as the whole environment of man makes man what he is, no part of that environment is without its effect on his law. Again, as man gains in his power to subject nature to his own desires, and as ethical ideas with advancing civilization take a firm and ever firmer hold on character, to a large extent we must look for the future development of legal ideas from a modification of our ideas of those things which we consider pleasurable.